

SERVED: November 30, 1999

NTSB Order No. EA-4803

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of November, 1999

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14832
v.)	
)	
PAUL E. RODERICK,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed the initial decision and order issued by Administrative Law Judge William R. Mullins on July 20, 1998.¹ In that decision, the law judge dismissed one of three allegations against respondent, finding violations of Sections 91.13(a) and 91.113(b) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91, but not 91.113(e), because of respondent's failure to "see and avoid" an oncoming aircraft.

¹An excerpt from the hearing transcript containing the initial decision is attached.

The law judge also modified the sanction ordered, from a 60-day suspension of respondent's commercial pilot certificate, to a 15-day suspension. The only issue raised by the Administrator in this appeal is the sanction reduction.² For the reasons that follow, the Administrator's appeal is granted.

This proceeding arose as a result of a non-fatal mid-air collision that occurred in a mountainous area east of Denali National Park, Alaska. On August 4, 1996, respondent was transporting tourists through a mountainous pass, operating a Cessna 185 under the provisions of 14 CFR Part 135. At the same time, Larry Kirsch³ was traveling through the same pass, but coming from the opposite direction. Kirsch was operating a helicopter, and he was transporting geologists who were observing the terrain. According to respondent, he did not notice the helicopter until, all of a sudden, it "popped up" slightly to his right, and in front of the Cessna. Respondent pulled back on the yoke and made a slight climbing left turn. The helicopter grazed the bottom of the Cessna, shearing off the tail wheel. Respondent was able to continue on to his destination and land safely.⁴ Kirsch was able to auto-rotate to a relatively soft landing spot. No one was seriously injured. Respondent reported

²Respondent has filed a brief in reply.

³This case was consolidated with the proceedings in the matter of Administrator v. Kirsch, SE-14807. The Administrator has not appealed the law judge's order regarding that proceeding.

⁴Respondent was able to get a pilot in another aircraft to look at the underside of his aircraft before he determined that he could proceed safely to his destination. Respondent's

the incident to the FAA.

The law judge dismissed the Administrator's allegation of a violation of FAR § 91.113(e), which charged that respondent had failed to alter his course to the right when confronted with an aircraft approaching head-on. Neither party has appealed that finding. Nor does respondent dispute the finding of violations of FAR § 91.113(b) and § 91.13(a), because of his failure to "see and avoid" Kirsch's aircraft.⁵

The Administrator offered into evidence an excerpt of the Sanction Guidance Table, contained in FAA Order 2150.3A, in support of the 60-day suspension that had been ordered. That excerpt reflects a 60- to 180-day suspension as appropriate for a violation described as "Operating so as to cause a collision hazard." See Complainant's Exhibit 6. The law judge found this sanction guidance unhelpful, because it related to conduct which he viewed as deliberate, which was not the case here. And, he deemed the 60-day suspension "inappropriate" because he dismissed the allegation of a violation of FAR § 91.113(e). Concluding that respondent is a long-time pilot without a violation history, and taking into consideration his post-incident conduct, the law judge instead affirmed a 15-day suspension. The Administrator asserts that such a drastic reduction in sanction fails to take into consideration the seriousness of the conduct, and is

(..continued)
decision to proceed is not in issue.

⁵Respondent filed a timely notice of appeal, but the appeal was subsequently withdrawn.

inconsistent with Board precedent.⁶ We agree.

The law judge should have deferred to the sanction guidance offered by the Administrator, as Board precedent supports drawing an analogy between creating a collision hazard and failing to see and avoid another aircraft. In Administrator v. Arellano, NTSB Order No. EA-4292 at 3 (1994), for example, we reinstated a finding of a violation of creating a collision hazard and affirmed a 90-day suspension, observing that "Board precedent unequivocally establishes that a pilot need not be aware that he has flown impermissibly close to another aircraft in order to be found to have violated FAR section 91.111(a)." (Citations omitted). And, in Administrator v. Blanc, NTSB Order No. EA-4112 (1994), we upheld a suspension of 180 days on violations of both § 91.111(a) (collision hazard) and § 91.113(b) (failure to see and avoid), as well as a residual violation of § 91.13(a), where a pilot failed to see and avoid an aircraft on the active runway as he entered it, even though he had full view of the entire runway. The conduct described in these cases is no more deliberate than the conduct exhibited by respondent. Moreover, respondent was transporting paying passengers under FAR Part 135 at the time of this mid-air collision. He owed them the highest degree of vigilance.

A law judge may not ignore applicable Board precedent.

⁶The Administrator urges the Board to reinstate the 60-day suspension ordered.

Administrator v. Peacon, NTSB Order No. EA-4607 at 4 (1997).⁷ In Administrator v. Sacks, 1 NTSB 1896, *recon. denied*, 1 NTSB 1894 (1972), cited by the Administrator, the Board upheld a 90-day suspension where a pilot failed to exercise diligence and do everything he could to see that no other aircraft were approaching to land before his takeoff from an airport. In Administrator v. Habelman, NTSB Order No. EA-4714 (1998), we upheld a 90-day suspension where a pilot attempting to take off failed to give way to a landing aircraft, resulting in a collision. And, in Administrator v. Kohorst, NTSB Order No. EA-3799 (1993), the Board upheld a 180-day suspension where a pilot failed to see and avoid other traffic. A 60-day suspension of respondent's commercial pilot certificate in light of this precedent is, notwithstanding the dismissal of the FAR § 91.113(e) violation, more appropriate.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and
2. The 60-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.⁸

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁷We also agree with the Administrator that respondent's violation-free history and his post-incident conduct were not pertinent to the law judge's sanction deliberations.

⁸For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).